2429

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1900.

FREDERICK WILLIAMS, *Petitioner,*

vs.

GEORGE C. GAYLORD ET AL., *Respondents.*

The respondents respectfully submit the following in opposition to the granting of the writ of *certiorari* applied for by petitioner herein.

STATEMENT OF THE CASE.

On April 23, 1880, the Legislature of the State of California passed an act entitled, "An Act for the protection of stockholders in mining companies," Section 1 of which is as follows:—

"SECTION 1.—It shall not be lawful for the directors of any mining corporation to sell, lease, mortgage, or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation, nor to purchase or obtain, in any way, any additional mining ground, unless such act be ratified by the holders of at least

two-thirds of the capital stock of such corporation. Such ratification may be made either in writing, signed and acknowledged by such stockholders, or by resolution duly passed at a stockholders' meeting called for that purpose."

Statutes of California 1880, p. 131.

At that time the policy of the State of California with reference to foreign corporations had been established by an express provision of its Constitution in terms as follows:—

"No corporation organized outside the limits of this "State shall be allowed to transact business in this State "on more favorable conditions than are prescribed by "law to similar corporations organized under the laws of "this State."

Constitution of Cal., Art. 12, par. 15.

These statutory and constitutional provisions were in full force at the time the instrument sued upon in this action was executed by the Gold Hill Mining Company under the circumstance hereinafter appearing.

The Gold Hill Mining Company was organized as a corporation under the laws of the State of West Virginia, June 23, 1890, for the avowed purpose of purchasing, operating, managing, and working mines in the State of California.

Record, pp. 197–198.

The trust deed sued upon in this action as a mortgage bears date July 1, 1890, and purports to be executed by the President and Secretary of the Gold Hill Mining Company. It is executed to G. Livingston Morse of the City of New York as trustee for the purpose of securing a prospective bond issue to the amount of $50,000, the property encumbered thereby being the Nevada City Quartz Mine and other property contiguous thereto situated in Nevada County, State of California.

The only authorization for the execution of this instrument appearing in the record is a resolution adopted at a meeting of the incorporators held July 25, 1890, before the organization of the corporation by the election of directors and officers of the corporation, before the company had either issued stock or acquired any property.

Record, p. 153.

There was no attempt to comply with the laws of California with reference to the ratification of the instrument, on the part of the stockholders, as required by the Act of 1880 above quoted.

Subsequently the Gold Hill Mining Company in the conduct of its mining operations in California became largely indebted to residents of that State for material, labor, and supplies. The respondents, Gaylord, Maddrill, and Rolfe, having obtained judgments against the company levied executions upon the property of the corporation, viz., the Nevada City Quartz Mine, and contiguous property, and at the execution sales became the purchasers of all such property.

Subsequent to these execution sales, and on November 23, 1897, the complainant, Frederick Williams, petitioner herein, a citizen of the State of New York, who had theretofore been substituted as trustee of the trust deed or mortgage in the place of G. Livingston Morse, deceased, commenced this action by filing a bill of foreclosure whereby he alleged that the defendant, the Gold Hill Mining Company, had executed the indenture as a mortgage or deed of trust; that it had made default in the performance of the terms and conditions of said instrument, and that the persons or parties other than said mining company impleaded as defendants, viz., respondents, Gaylord,

Maddrill, and Rolfe, had or claimed to have some interest or lien upon the premises covered by the indenture sought to be foreclosed in this suit as a mortgage.

The prayer of the bill was for a foreclosure of the indenture as a mortgage and for specific equitable relief.

The Gold Hill Mining Company having been duly served with process made default.

The other defendants, Gaylord, Maddrill and Rolfe, answered, setting up their status with reference to the property involved, as above specified, and further pleaded specially, *inter alia*, that the indenture was void because it had not been made in conformity with the requirements of the California statute heretofore quoted.

All of the issues are comprehensively stated in the opinion of Judge Morrow, who tried the cause, (Record, p. 127).

Upon trial of the action the Circuit Judge sustained the special defense of defendants Gaylord, Maddrill and Rolfe, above stated, held the indenture under consideration invalid for non-compliance with the California statute, and directed a dismissal of the bill of foreclosure.

That court in sustaining this defense and dismissing the bill, held:—

(1) That the instrument sued upon as a mortgage was not ratified in the manner prescribed by the California statute.

(2) That the Supreme Court of California had held repeatedly (*a*) that instruments of this character were absolutely void unless ratified in one of the methods prescribed by the statute; (*b*) that any one could take advantage of this fact, and that this defense was not limited to stockholders.

(3) That the Act applied to all mining corporations whether organized under the laws of California or elsewhere. That foreign corporations under the Constitution of the State were not permitted to do business therein on terms more favorable than those exacted from domestic corporations.

(4) That the duty of the Federal Court was to follow the decisions of the Supreme Court of California, construing the statute, and that its duty ended when the force and effect of these decisions were stated.

This view was sustained by the Circuit Court of Appeals. The opinions of the respective courts embodied in the record clearly indicate the inductive methods by which the legal conclusions were reached.

ARGUMENT.

No Federal question is involved in this case. The Circuit Court acquired jurisdiction solely by reason of the diversity of citizenship of the parties. The decision of the Circuit Court of Appeals is therefore final.

Petitioner seeks by this proceeding to secure from the Supreme Court of the United States the prerogative writ of *certiorari* in order that it may review the action of the Circuit Court of Appeals. The grounds relied upon by him to invoke the power of this court in his behalf may be briefly epitomized:—

(1) The decrees of the Circuit Court and Circuit Court of Appeals are contrary to law and the decisions of this (Supreme) Court; because they proceed upon the theory and decide that the decision of the State court permitting judgment creditors to set up and avail themselves of the benefit of an Act exclusively designed

and expressly stated to be for the benefit of stockholders in mining companies, is binding upon the Federal courts as a construction of a State statute by the highest court of said State as against a foreign corporation, the trustee of its mortgage and the *bona fide* holders of its negotiable bonds; when in fact, as your petitioner represents, said question is extrinsic to any construction of said statute, relates to general commercial law and has been long settled in a manner favorable to persons occupying the position of petitioner and the bondholders represented by him by numerous and prior decisions, some of which were rendered or concurred in by members of this court.

(2) That said mortgage was signed by officers owning more than two-thirds of the stock of said mining company and consenting thereto, and said mortgage was acquiesced in and accepted as valid by the stockholders of said company.

(3) That the matters involved in this case relate not to mere questions of local law or importance, but to questions of general and commercial law affecting vast interests of foreign corporations in various States of the Union, and the safeguards surrounding owners of their negotiable bonds authorized by the laws of the State creating the corporation as against subsequent creditors, whether by judgment or otherwise, renders this case eminently one in which a writ of *certiorari* should be granted.

(4) This case, moreover, involves the large amount of $50,000 of bonds, with interest thereon nearly equal in amount, owned by various persons who gave full value therefor.

We respectfully submit, that none of these specifications —if the broad and evidently labored generalizations may be so classified — brings petitioner within the oft repeated rule of this Court upon the subject of writs of *certiorari*. We may be pardoned for quoting from the decisions of this Court in this behalf:—

"It is evident that it is solely questions of gravity and "importance that the Circuit Court of Appeals should "certify to us for instructions, and it is only when such "questions are involved that the power of this Court to "require a case, in which the judgment and decree of the "Court of Appeals is made final, to be certified, can be "properly invoked. . . . . While this power is "co-extensive with all possible necessities and sufficient "to secure to this Court final control over the litigation in "all the courts of appeal, it is a power which will be spar-"ingly exercised, and only when the circumstances of the "case satisfy us that the importance of the question involved, "the necessity of avoiding conflict between two or more "courts of appeal and the Courts of the State, or some "matter affecting the interests of this nation in its internal "or external relations, demand such exercise."

Forsythe v. *Hammond*, 166 U. S. 506.

In the cases cited below this Court issued its writ of *certiorari* to review decisions of Circuit Courts of Appeal, but in each case stated with forceful precision that the writ was issued only because of extraordinary circumstances involved in the case.

Lau Ow Ben, 141 U. S. 583; 144 U. S. 47;

Ex parte Woods, 143 U. S. 202;

U. S. v. *Three Friends*, 166 U. S. 1.

The case here presented does not fall within any of the enumerated categories. Nevertheless, a brief analysis of the grounds relied upon by petitioner and the application to them of the principles of law which are necessarily

controlling may not be out of place, as the petition seems to be urged with earnestness and apparent sincerity. We take these grounds up for discussion:—

I.

Petitioner seeks to destroy the force of the rule, applied by the courts below in this case, that in dealing with state statutes the Federal Courts are bound to follow the interpretation given to them by the highest courts of the state, by the statement, *first*, that the state interpretation in the present instance is erroneous; *second*, that such interpretation is extrinsic to the statute, relates to *general commercial law*, and the principle involved has been settled by other courts in a manner favorable to petitioner; therefore, the Federal Courts are at liberty to disregard the decisions of the highest court of the state, and practically sit as appellate courts to review state decisions interpreting state statutes.

Upon an examination of the decisions of the Supreme Court of the State of California we find that the statute in question has been before that court a number of times. Its constitutional validity, construction, scope and effect, were established upwards of ten years ago, and long prior to the execution of the instrument sued upon in this action.

The language of the Supreme Court of California upon this subject is very clear. Says the Court:—

"We think that the provision of said Act goes to the "power or authority of the directors. It cannot be con- "strued to relate merely to their personal liability, for no "penalty is imposed upon them, and to so construe it would "be to practically nullify the Act. In our opinion the "directors in mining corporations have no power or author- "ity to convey the mining ground without the consent of "holders of two-thirds of the stock given as prescribed by "the Act; and it follows without such consent the title

" does not pass. And if this be so the question can be " raised by any one who connects himself with the title of " the corporation which owned the property, as well as by " the stockholders thereof. Nor can the consent of the " stockholders be presumed from the mere fact of the con- " veyance, whether under the corporate seal or not, for such " consent or ratification may be after the deed is executed, " and hence it is not necessarily or presumptively involved " in the execution of such deed."

McShane v. *Carter*, 80 Cal. pp. 310, 312, decided Sept. 3, 1889.

The rule established in *McShane* v. *Carter* was reaffirmed by express language of approval in *Pekin Mining Company* v. *Kennedy*, 81 Cal. 356, decided November 29, 1899, in which case the instrument assailed as not having been executed in compliance with the statute — was executed by a *foreign* corporation — i. e., one organized under the laws of the State of Illinois. The doctrine was again expressly affirmed as to the provision under consideration in *Granite Gold Mining Company* v. *McGinnis*, 118 Cal. 131, 137, decided September 10, 1897, and again in *Johnson* v. *California Lustral Co.*, 127 Cal. 284.

It thus appears that the settled law applicable to the case has been clearly announced by the State Court of last resort. The validity of the law, and its true construction, have been for many years clearly established and free from doubt.

There can be no question as to what is the general rule uniformly followed by the Federal Courts with reference to the binding force of State decisions. This rule has been tersely stated by this Court as follows :—

" Upon the construction of the Constitution and laws of " a State, this Court as a general rule follows the decisions " of her highest Court unless they conflict with or impair " the efficacy of some provision of the Federal Constitu- " tion or a rule of general commercial law. . . .

"Substantially conclusive effect is given to such decis-
"ions upon the construction of State statutes as affecting
"title to real estate within the State."

Gormley v. *Clark*, 134 U. S. 338.

Citations from the decisions of this Court might be multiplied indefinitely. We do not understand that counsel for petitioner denies the rule. The burden of his complaint is that the question at issue is one of "general commercial law," for the true solution of which the Federal Courts are not confined to the decisions of the Supreme Court of the State.

We fail to observe how a matter which is confessedly the proper subject of State legislation when once embodied in a statute can be classified as "general commercial law." It is essentially a local state statute.

What is meant by the term "general commercial law"?

"Commercial law is a system of jurisprudence acknowl-
"edged by all maritime nations, and upon no subject is it of
"more importance than that there should be, as far as prac-
"ticable, uniformity of decision throughout the world. . .

"Commercial law, says Bouvier, is a phrase employed
"to denote the branch of the law which relates to the
"rights of property and the relations of persons engaged
"in commerce. Persons engaged in commercial adven-
"tures, wherever they may have their domicile, have
"business relations throughout the civilized world, from
"which it results that commercial law is less local and
"more international than any other system of law, except
"the law of nations (p. 55). . . .

"State decisions in respect to titles to real estate and
"transfers of property, usually furnish the rule of deci-
"sion in the Federal courts, by virtue of the beforemen-
"tioned provision of the Judiciary Act; but the established
"practice is, that it does not apply except in matters of a
"strictly local character; that is to say, to the positive
"statutes of the States and the interpretations of the same
"by their own tribunals, including rights and titles to
"things having a permanent locality, such as real property,

"and that it does not extend to questions of general com-
"mercial law, from which it follows that where any contro-
"versy arises as to the liability of a party to a bill of
"exchange, promissory note or other negotiable paper, in
"one of federal courts, which is not determined by the
"positive words of a State statute, or its meaning as con-
"strued by the State Courts, the Federal Courts will
"apply to its solution the general principles of the Law
"Merchant, regardless of any local decision. 1 Daniel
"Neg. Inst. (2nd Ed.) sec. 10."

Railroad Company v. *National Bank*, 102 U. S. 14, 31, 55, 57.

This question was quite fully considered by this Court in a case where the inquiry was identical so far as this point is concerned with the case at bar, except only that the mortgage there considered was one upon personal property only. Said the Court:—

"The matter is not one of purely general commercial
"law. While chattel mortgages are instruments of general
"use, each State has a right to determine for itself under
"what circumstances they may be executed, the extent
"of the rights conferred thereby, and the conditions of
"their validity. They are instruments for the transfer
"of property, and the rules concerning the transfer of
"property are primarily at least a matter of State regula-
"tion.

Etheridge v. *Sperry*, 139 U. S. 266, 276.

See, also,

Wilson v. *Perrin*, 11 Circuit Court of Appeals, Rep., pp. 66, 68, and cases cited.

Brown v. *Furniture Co.*, 7 C. C. A. 225 (58 Fed. 286).

Counsel in his position employs the terms "foreign corporation," "negotiable bonds," and "*bona fide* holders," terms in frequent use in the Law Merchant, just as if this mere descriptive terminology earmarked the case as one of "general commercial law," and casts it into the mold of the "*lex mercatoria*."

These "negotiable bonds" are the evidences of an indebtedness purporting to be issued by the Gold Hill Mining Company, a foreign corporation. The validity of this indebtedness as such is not disputed. But these bonds are secured by a trust deed or mortgage upon real property situated in the State of California. It is the validity of *this* instrument that is assailed because it fails to comply with the laws of the State where the property affected by it is situated.

It is a familiar rule of the common law that the "*lex rei sitæ*" controls the sale, hypothecation, alienation, and descent of real property. The law of the place where the property itself is situated must necessarily be looked to for the purpose of determining the validity of a questioned transfer or encumbrance. The law of the *situs* and its interpretation by the highest court of the State is just as much a part of the contract as if they were incorporated into it. If one invests in mortgages, mortgage bonds, or real estate securities without ascertaining the condition of the title according to the law of the State where the property is situated he does so at his peril. If the instrument under which he claims is fatally defective under the law of the place no amount of *bona fides*, however persistently urged, will cure or atone for the defect. A deed which might be valid in West Virginia might be wholly worthless to pass title to property in California, and the decision of the question would in no sense involve a consideration of the principles of "general commercial law."

That the State of California had the right to prescribe the manner in which instruments affecting the title to real property in that State should be executed, and to define

what should and what should not be considered a valid transfer or encumbrance of such property, ought not to be seriously questioned.

"It is a principle too well established to admit of dis-
" pute at this day, that to the law of the State in which
" the land is situated we must look for the rules which
" govern its descent, alienation, and transfer and for the
" effect and construction of its conveyances."

McGoon v. *Scales*, 9 Wall. 23, quoted in
Brine v. *Hartford Fire Ins. Co.*, 96 U. S. 627.

"The power of the State to regulate the tenure of real
" property within her limits, and the modes of its acquisi-
" tion and transfer, and the rules of its descent, and the
" extent to which a testamentary disposition of it may be
" exercised by its owners, is undoubted. It is an estab-
" lished principle of law, everywhere recognized, arising
" from the necessity of the case, that the disposition of
" immovable property, whether by deed, descent, or any
" other mode, is exclusively subject to the government
" within whose jurisdiction the property is situated. (*Mc-
" Cormick* v. *Sullivant*, 10 Wheat. 202.) The power of the
" State in this respect follows from her sovereignty within
" her limits, as to all matters over which jurisdiction has
" not been expressly or by necessary implication transferred
" to the Federal Government. The title and modes of
" disposition of real property within the State, whether
" *inter vivos* or testamentary, are not matters placed under
" the control of the federal authority. Such control
" would be foreign to the purposes for which the federal
" government was created, and would seriously embarrass
" the landed interests of the State."

United States v. *Fox*, 94 U. S. 315, 320.

The principle is announced and followed in numerous cases.

Jackson ex dem. v. *Chew*, 12 Wheat. 152;
Hinde v. *Vattier*, 5 Pet. 396, 400;
Livingston v. *Moore*, 7 Pet. 469, 542;
Suydam v. *Williamson*, 24 How. 427, 433;
Townsend v. *Todd*, 91 U. S. 452, 453;

Ober v. *Gallagher*, 93 U. S. 199, 207;
Hall v. *Decuir*, 95 U. S. 485, 500;
Barrett v. *Holmes*, 102 U. S. 651, 655;
Bucher v. *Cheshire R. R. Co.*, 125 U. S. 555, 582;
German Bank v. *Franklin Co.*, 128 U. S. 526, 538;
Randolph v. *Quidnick Co.*, 135 U. S. 457, 463;
Cross v. *Allen*, 141 U. S. 528, 538;
Merchants' Bank v. *Pennsylvania*, 167 U. S. 461, 462;
Hartford F. Ins. Co. v. *Chicago M. & St. R. R. Co.*, 175 U. S. 91, 100 (1899).

"Since the ordinary administration of the law is carried "on by the State Courts it necessarily happens that by the "course of their decisions certain rules are established "which become rules of property and action in the State "and have all the effect of law, and which it would be "wrong to disturb. This is especially true with regard to "the law of real estate and the construction of State consti-"tutions and statutes. Such established rules are always "regarded by the Federal Courts no less than by the State "Courts themselves, as authoritative declarations of what "the law is.

Burgess v. *Seligman*, 107 U. S. 20, 33;
B. & O. Railroad v. *Baugh*, 149 U. S. 368, 372.

The special feature of the rule announced by the Supreme Court of California in *McShane* v. *Carter*, which is particularly obnoxious to counsel for petitioner, is that it permits parties other than stockholders to raise the question of the validity of the conveyance. He maintains that other States having similar statutes have held that only stockholders can complain of a failure to comply with their terms, and that the logic and reason is with the other States. This is quite immaterial. Each State determines for itself what rules shall apply to the disposition of property within its limits. That two States may have precisely the same statutes on a

given subject, and their respective courts place constructions diametrically opposed is no reason why Federal interposition should be invoked to compel uniformity, and force upon one State a rule sanctioned by another because the inherent logic and persuasive force of one decision may in the opinion of the Federal Courts entitle it to be accepted as the rule to be applied in both States, or in all States where there are similar local statutes.

This Court has heretofore had occasion to consider this class of arguments, and it is conclusively disposed of as follows:—

"As to the construction of a State statute we generally "follow the rulings of the highest Court of the State. . . . . "So, when the highest Court of a State affirms that a con- "veyance made by a debtor to a trustee for the benefit of "creditors is valid under the statutes of that State, we "should ordinarily in any case involving the validity of "such conveyance follow that ruling, *even though that statute* "*was common to many* States and in others a different rul- "ing had obtained."

Randolph v. *Quidnick Co.*, 135 U. S. 457, 463.

"The construction by the Courts of a State of its consti- "tution and statutes is, as a general rule, binding on the "Federal Courts. We may think the Supreme Court of a "State has misconstrued its constitution or its statutes, but "*we are not at liberty to set aside its judgments.* That Court "is the final arbiter as to such questions."

Forsyth v. *Hammond*, 166 U. S. 506, 518.

A case arising under the recording Acts of Connecticut is quite instructive on this point. We quote from the opinion of the Court:—

"The question depends upon the recording Acts of the "State of Connecticut; and we are bound to follow the "decisions of the Courts of that State in their construction "of these Acts, if there has been a uniform course of "decisions respecting them."

The Court then cites Connecticut cases which "are clear and decisive against the validity of the mortgage in question." Citing the case of *Bramhall* v. *Flood*, 41 Conn. 72, the Court continues:—

"It is there held that the mortgage must describe the "debt intended to be secured, and that it is not sufficient "that the debt be of such a character that it might have "been secured by the mortgage had it been truly described.

"*In most of the States a mortgage like the one before us, "reciting a specific indebtedness, but given in fact to secure "advances or indorsements thereafter to be made, is a valid "security*, and would be good to secure the $6,000 actually "advanced before other incumbrances were placed upon "the property. (Citing cases.)

"We should be quite willing to give the appellant the "benefit of this principle to the extent of his actual "advances, *but the contrary rule seems to be so well settled in "Connecticut that we are not at liberty to do so.*"

Townsend v. *Todd*, 91 U. S. 452, 453.

And in the chattel mortgage case of *Etheridge* v. *Sperry* heretofore cited the Court said:—

"We are aware that there is a great diversity in the rul- "ings on this question by the Courts of the several States, "but whatever may be our individual views as to what the "law ought to be in respect thereto, there is so much of a "local nature entering into chattel mortgages that this "Court will accept the settled law of each State as decisive "in respect to any case arising therein."

139 U. S. 266, 276.

It is true that in other States statutes similar to the Statute of April 23, 1880, have been construed less harshly than in California, but this fact is of no moment here. It cannot avail petitioner.

Where different States have adopted the same statutes, and their courts differ in construction, the Federal courts administer the law of each, notwithstanding seeming inconsistencies.

Shelby v. *Guy*, 11 Wheaton, 361.

"Nor does it matter that in courts of other States . . . "a different interpretation may have been adopted. If "such be the case, the courts of the United States will, in "conformity with the same principle, follow the different "ruling, so far as it affects title in those States. The "interpretation within the jurisdiction of one State becomes "a part of the law of that State, as much so as if incor- "porated into the body of it by the Legislature. If, there- "fore, different interpretations are given in different States "to a similar local law, that law, in effect, becomes, by the "interpretations, so far as it is a rule for our action, a "different law in one State from what it is in the other. "'That the Statute laws of the States,' says Mr. Justice "Johnson, in delivering the opinion of this court in *Shelby* "v. *Guy*, 'must furnish the rule of decision of this court, "'so far as they comport with the Constitution of the "'United States, in all cases arising within the respect- "'ive states, is a position that no one doubts. Nor is it "'questionable that a fixed and received construction of "'their respective statute laws, in their own courts, makes, "'in fact, a part of the statute law of the country, however "'we may doubt the propriety of that construction. It is "'obvious that this admission may at times involve us in "'seeming inconsistencies—as where States have adopted "'the same statutes, and their courts differ in the con- "'struction. Yet that course is necessarily indicated by "'the duty imposed upon us, to administer as between "'certain individuals, the laws of the respective States, "'according to the best lights we possess of what those "'laws are.'"

Christy v. *Pridgeon*, 71 U. S. (4 Wall.) 196, 203.

"The construction so far as contract obligations incurred "under it are concerned, constitutes a part of the law as "much as if embodied in it. So far does this doctrine "extend that when a statute of two States, expressed in "the same terms, is construed differently by the highest "courts, they are treated by us as different laws, each "embodying the particular construction of its own State, "and enforced in accordance with it in all cases arising "under it. (*Christy* v. *Pridgeon*, 4 Wall. 196, and *Shelby* "v. *Guy*, 11 Wheat. 361.) The statute, as thus expounded, "determined the validity of all contracts under it."

Louisiana v. *Pilsbury*, 105 U. S. 278, 294.

"The fact that similar statutes are allowed different "effects in different States is immaterial.

"As observed by Mr. Justice Field, speaking for this "court, 'The interpretation within the jurisdiction of one "'State becomes a part of the law of that State, as much "'so as if incorporated into the body of it by the Legis-"'lature. If, therefore, different interpretations are given "'by different States to a similar local law, that law in "'effect becomes by the interpretations, so far as it is a "'rule for our action, a different law in one State from "'what it is in the other.'"

Chicago Union Bank v. *Kansas City Bank*, 136 U. S. 223, 235.

Because of the rule thus stated, many of the authorities cited by petitioner are without application to the case at bar. Thus in *Campbell* v. *Argenta G. & S. M. Co.*, 51 Fed. Rep. 1 (Circuit Court), the opinion states in terms that it differs from the decision of the California court. In that case the Circuit Court was not controlled by any prior interpretation of the Montana statute involved.

In the case of *Sioux City R. R. Co.* v. *Trust Co.*, 82 Fed. Rep. 124 (Circuit Court of Appeals), the Court, per Sanborn, J., announce the rule that where the highest court of a State has determined the extent of the powers and liabilities of corporations, created under its laws, that decision is conclusive in the national courts in all cases involving no questions of general or commercial law and no question of right under the Federal Constitution.

Accordingly the mortgage involved was held valid under the Iowa statute.

In the case of *The Vigilancia*, 73 Fed. 452 (Circuit Court of Appeals), the court, per Wallace, J., decided that the decision was based upon the interpretation placed upon cognate statutes by the highest courts of the State of New York.

In the case of *G. V. B. Mining Co.* v. *First Nat. Bank of Hailey*, 95 Fed. 23 (Circuit Court of Appeals), Judge Hawley, in deciding that the corporation there before the court was estopped to deny the validity of the contract, bases the opinion of the court upon a law of the State of New York, which was construed by the courts of that State differently from the decision of the California court. No statute of Idaho (where the land was situated) was involved.

In the case of *Nevada Nickel Syndicate* v. *Nat. Nickel Co.*, 96 Fed. 144 (Circuit Court), no statutory provision was involved.

We deem it not improper to state that the record in *McShane* v. *Carter*, which we have examined, shows that every point of law made upon the merits in this case was urged as well upon the Supreme Court of California in that case (see Record Supreme Court of California in *McShane* v. *Carter*, No. 12,578). The decision in *McShane* v. *Carter* is not to be dealt with as a judicial inadvertence; it is the deliberate and absolute determination by the court of last resort of California of every point of law presented upon the merits in this case.

It is urged that the statute in question was not intended to apply to foreign corporations, and the Gold Hill Mining Company being such, its acts are not to be measured by the Act in question. It will also be observed as noted in the opinion of the Circuit Court of Appeals, that the Supreme Court of California necessarily passed upon this identical question in the case of *Pekin Mining Company* v. *Kennedy*, 81 Cal. 355, 362, where the instrument declared void was executed by a foreign corporation.

This question was fully considered by both trial and appellate courts, and the conclusion reached was adverse to petitioner, as will appear by reference to the respective

opinions of these courts. There is but little if anything to be added to what is there said.

It appears that the Constitution of the State of California by express provision (Art. XII, Sec. 15), declared the policy of the State concerning foreign corporations, by directing that such corporations should not transact business in California under less restraint than domestic corporations.

This Constitution went into effect July 4, 1879.

The act under discussion was approved April 23, 1880, and took effect upon its passage.

It is entitled: "AN ACT FOR THE FURTHER PROTECTION OF STOCKHOLDERS IN MINING COMPANIES," and provides:—

"Section 1. It shall not be lawful for the directors of "any mining company, to sell, lease, mortgage or otherwise "dispose of the whole or any part of the mining ground "owned or held by such corporation." . . .

Stats. of 1880, pp. 131, 132.

The language of the statute clearly covers all corporations, foreign as well as domestic.

We claim, therefore, that the Act must be construed as intended to enforce the mandate of the Constitution. To construe it as applicable to domestic corporations only, would be to make it antagonistic in spirit and principle to the provision of the Constitution; to construe it as of universal application will make it consistent and harmonious with the Constitution. These alternatives being presented, it is the duty of the Court to so construe the statute as to place it in harmony with the Constitution.

"If there were room for two constructions, both equally "obvious and reasonable, the Court must in deference to "the Legislature of the State, assume that it did not over-"look the provisions of the Constitution. . . . . Our "duty, therefore, is to adopt that construction, which "without doing violence to the fair meaning of the words "used, brings the statute into harmony with the provisions "of the Constitution."

Grenada Co. Supervisors v. *Brogden*, 112 U. S. 261, 268;
Cooley's Constitutional Limitations, p. 218;
Presser v. *Illinois*, 116 U. S. 252, 269.

We contend that any fair construction of the statute must maintain it in harmony with the Constitution as a piece of legislation applicable to foreign as well as domestic corporations.

Petitioner seeks to treat the statute of April 23, 1880 (Stats. 1880, p. 131), as if it were ambiguous, of doubtful meaning requiring forced construction, as if there were occasion for reference to the title of the Act to aid in construing its doubtful meaning. We submit that there is no occasion justifying the labored effort of petitioner in this connection. The language of the statute is clear; its meaning free from doubt.

When there is no ambiguity in a statute itself, there can be no necessity for resorting to the title. It cannot be used to extend or restrain positive provisions contained in the statute, nor can it control express words in the statute.

Hadden v. *The Collector*, 5 Wall. 107, 110.

Petitioner is in error as well in stating that the two Acts (Stats. 1880, p. 131, and Stats. 1880, p. 134), relate to the same subject matter.

The distinctive subject matters of these Acts are stated in the opinion of the lower Court (Record, pp. 114, 115), which shows clearly that the case is not one coming within the rule of *People ex rel* v. *Jackson*, 30 Cal. 427.

If a close analysis and construction of the statutes (Stats. of 1880, p. 133,) were to be made it would, we think, have to be conceded that the Legislature made distinctive provisions to govern the various operations of mining corpo-

rations in the State of California over which it had the power to exercise control.

Thus, realizing that it had full power to provide that no corporation, domestic or foreign, should convey or incumber real property within its territorial limits except in the manner prescribed by statute, it formulated Section 1 of the Act applicable to corporations, domestic and foreign without exception.

Realizing further that it had no power to control the internal management of foreign corporations, it formulated Sections 2 and 3 of the Act, applicable in terms "to each and every mining corporation in this State."

This construction would be proper, fair, and in accordance with well established rules.

There is a wise and well understood rule applicable in interpreting a legislative enactment, which is to the effect that where terms are reasonably capable of two constructions, the one of which is, the other of which is not, consistent with the fundamental and paramount law, delegating or restraining the authority to enact, that construction must be adopted which renders it effectual rather than that which in whole or in part defeats its operation.

Freight Discrimination cases, 95 N. C. 431;
See, also, *People* v. *Frisbie*, 26 Cal. 135.

The amendment to the Act approved March 9, 1897 (Stats. 1897, c. 92,) (Record. pp. 15, 16,) referred to by petitioner, is consistent with every provision of the former act, and re-enforces many of its chief provisions.

The amendment merely provides:—

1. How the statutory ratification by stockholders may be evidenced by secretaries of mining corporations, and,

2. That no one except a stockholder shall be permitted to urge any objection to the *acquisition of any additional ground or other property by such corporation.*

In other words, in full contemplation of the decision of *McShane* v. *Carter*, the Legislature of California amended the statute involved only by providing to the effect that no one except a stockholder might urge an objection to the *acquisition* of any additional ground or other property by such corporation. All the other provisions of the former statute, directing that it shall not be lawful for the directors of any mining corporation to sell, lease, mortgage, or otherwise dispose of the whole or any part of the mining ground owned or held by such corporations, etc., are substantially re-enacted.

Statutes of 1897 (Bancroft-Whitney Ed.) p. 96.

According to well settled rules of construction this (with the modifications referred to) constitutes an express legislative concurrence in and approval of the rule established in *McShane* v. *Carter*, so far as it applies to conveyances or incumbrances made by mining corporations of title to mining ground.

The re-enacting of the prohibitory provisions above referred to, implying an express approval of the expositions thereof made by the courts, also reaffirms the policy of the State in the premises.

The constitution and legislation of a State may validly provide for the control of any transaction or series of transactions affecting property within its limits by a foreign corporation. A corporation created elsewhere than in California can assert its corporate existence and powers in California only by comity of that State and subject to its regulations.

Conceding that the State of California could not effectively prescribe rules for controlling the internal affairs of foreign corporations, there is still no doubt of its power to validly prescribe regulations to control foreign as well as domestic corporations in any and all transactions made affecting property situated within her State limits.

The opinion of the Judges of the Circuit Court on this point (*vide* Transcript of Record, 115), as well as that of the Appellate Court, are quite exhaustive of the subject. We add just a few more to the citations made by them.

"A corporation has no implied authority to do an act "in a foreign State which is not permitted by the laws of "the latter to individuals generally. The law of comity "merely enables a body of corporators chartered by one "State to act in a corporate capacity in another State, *sub-*"*ject to all the laws and regulations of the latter.*"

Morawetz on Corporations, Sec. 964.

The United States Supreme Court, speaking through Mr. Justice White, said:—

"The State of California has power to exclude foreign "insurance companies altogether from her territory, "whether they were formed for the purpose of doing a "fire or marine business. She has the power, if she "allows any such companies to enter her confines, to deter-"mine the conditions upon which the entry shall be made. "And as a necessary consequence of her possession of "these powers, she has the right to enforce any conditions "imposed by her laws as preliminary to the transaction of "business within her confines by a foreign corporation, "whether the business is to be carried on through officers "or through ordinary agents of the company, and she has "also the further right to prohibit a citizen from contract-"ing within her jurisdiction with any foreign company "which has not acquired the privilege of engaging in "business therein, either in his own behalf or through an "agent empowered to that end. *The power to excludl* "*embraces the power to regulate, to enact and enforce ale* "*legislation in regard to things done within the territory of*

" *the State which may be directly or incidentally requisite in* " *order to render the enforcement of the conceded power effica-* " *cious to the fullest extent*, subject always, of course, to the " paramount authority of the Constitution of the United " States."

(The italics are ours.)

Hooper v. *California*, 155 U. S. 648, 655.

Petitioner does not claim that there is any express provision making any reservation in his favor from the provisions of that Act of April 23, 1880.

The opinion rendered in *Bank of B. N. A.* v. *Madison*, 99 Cal. 125, is specially instructive here, because it reaffirms the policy of the State concerning foreign corporations as declared by the provisions of its constitution. Says the Court:—

" The State has indicated as its policy that corporations " that engage in banking, whether foreign or domestic, " shall at stated intervals publish to the world, for the pro- " tection of those who may desire to deal with them, cer- " tain information concerning their assets and liabilities, " and it is incumbent upon every corporation that would " engage in such business to make a substantial compli- " ance therewith. The fact that the plaintiff is a foreign " corporation, and that it is for that reason more difficult " to comply with the statute, does not exempt it from this " obligation, for the Constitution (Art. XII, Sec. 15) declares " that ' no corporation organized outside the limits of this " ' State shall be allowed to prosecute business within this " ' State on more favorable conditions than are prescribed " ' by law to similar corporations organized under the laws " ' of this State.' "

Bank of British North America v. *Madison*, 99 Cal. 125, 133,

Bearing in mind the constitutional provision applicable, the language of the statute enacted immediately after its adoption providing in general terms for the control of every (any) mining corporation and construing these two

laws in harmony, we think the judicial mind should be irresistibly moved to hold that the statute was intended to be of general application. To hold otherwise would be to hold that the Legislature instead of acting in aid of the Constitution deliberately passed a statute which would necessarily operate in violation of it.

The rule essentially fair and fitting to our American system of political and judicial control is that when a foreign individual or corporation comes to the State of California, all its transactions there are subject to and circumscribed by the same limitations as those of every other person within the State. It is bound by the laws of the State which apply and by the decisions of the State Courts thereon. A very graphic description of the situation is presented in an opinion of Mr. Justice Brewer:—

" In *Barnes* v. *The District of Columbia*, 91 U. S. 540, this " Court after referring to the case from 21 Michigan *supra*, " and the doctrine stated therein, observed that 'The " 'authorities establishing the contrary doctrine, that a city " 'is responsible for its mere negligence, are so numerous " 'and so well considered that the law must be deemed to " 'be settled in accordance with them,' citing in support a " long list of authorities. The authorities which support " a different view are collected in *Hill* v. *Boston*, 122 Mass. " 344. But even if it were a fact that the universal voice " of the other authorities was against the doctrine announced " by the Supreme Court of Michigan, the fact remains that " the decision of that Court, undisturbed by legislative " action, is the law of that State. Whatever our views may " be as to the reasoning or conclusion of that Court is imma- " terial. It does not change the fact that its decision is the " law of the State of Michigan, binding upon all its Courts, " and all its citizens, and all others who may come within " the limits of the State. The question presented by it is " not one of general commercial law; it is purely local in its " significance and extent. It involves simply a considera- " tion of the powers and liabilities granted and imposed " by legislative action upon cities within the State. While " this Court has been strenuous to uphold the supremacy

" of Federal law, and the interpretation placed upon it by " the Federal Courts, it has been equally strenuous to " uphold the decisions by State Courts of questions of " purely local law. There should be, in all matters of local " nature, but one law within the State; and that law is not " what this Court might determine, but what the Supreme " Court of the State has determined. A citizen of another " State going into Michigan may be entitled under the Fed- " eral Constitution to all the privileges and immunities of " citizens of that State; but under that Constitution he can " claim no more. He walks the streets and highways in " that State entitled to the same rights and protection, but " none other, than those accorded by its laws to its own " citizens."

Detroit v. *Osborne*, 135 U. S. 492, 498.

II.

Petitioner contends that the trust deed or mortgage was signed by *officers* owning more than two-thirds of the stock of the Gold Hill Mining Company and that the mortgage was acquiesced in and accepted as valid by the stockholders of said company.

The indenture under consideration cannot be taken out of the general rule upon the contention that there was equitable ratification of any matters constituting an estoppel *in pais*.

We repeat for convenient reference under this head the language of the Supreme Court of the State of California in *McShane* v. *Carter*, applicable here:—

" We think that the provision of said act goes to the " power or authority of the directors. It cannot be con- " strued to relate merely to their personal liability, for no " penalty is imposed upon them, and to so *construe it would* " *be to practically nullify the act.* In our opinion the " directors of mining corporations have no power or " authority to convey the mining ground without the con- " sent of holders of two-thirds of the stock given as " prescribed by the act, and it follows without such con-

"sent the title does not pass. And if this be so the "question can be raised by any one who connects himself "with the title of the corporation which owned the prop- "erty, as well as by the stockholders thereof."

McShane v. *Carter*, 80 Cal. 312 (Sept, 1889).

This decision has been much criticised because of the sweeping, radical character of its terms. But there can be no doubt that it expresses the deliberate judgment of our State court of last resort delivered in bank, and does so with exceptional precision and emphatic clearness. It declares:—

First. That directors of mining corporations *have no power to convey* mining ground without the consent of holders of two-thirds of the stock.

Second. That such consent of stockholders must be given *as prescribed by the act.*

Third. That without such consent *the title does not pass.*

Fourth. That the question can be raised *by any one who connects himself with the title of the corporation, as well as by the stockholders thereof.*

This clearly and unequivocally means that unless the conveyance of mining ground made by a mining corporation is ratified by two-thirds of its stockholders, and is so ratified as prescribed by the act, such conveyance is void. "No title passes."

It follows then, we contend, conclusively that because the indenture under consideration was intended to operate as a deed of trust conveying the title of mining ground owned by a mining corporation to the plaintiff, and because *no ratification by stockholders as prescribed by the statute* was shown, therefore, *no title passed.* The instrument

was void. Being void it could not be ratified by any person; not even in the interest of one who has *bona fide* parted with an adequate valuable consideration, placing reliance upon its validity.

The principle is that a void act can not be ratified.

"Confirmation may make good a voidable or defeasible "estate but cannot operate upon or aid an estate which is "void in law but only confirms its infirmity. *Confirmatio "est nulla ubi donum precedens est invalidum, et ubi donatio "nulla est, nec valebit confirmatio.* The only exception to "this rule is where the confirmation is the act of the "sovereign will." (Comyn's Digest, Vol. 3, page 139; D. I., p. 140; *Blessing* v. *House*, 3 Gill & John. 290.)

Branham v. *Mayor and Common Council, etc.*, 24 Cal. 585, 605.

In an action brought in New Jersey to enforce a promissory note made in that State, it was held that since the note was actually made on a Sunday, though it bore date on a Saturday, it was void by virtue of the Sunday law, which enacts that: "No traveling, worldly employment or business shall be done on a Sunday." The fact that part of the interest had been paid could not affect the case. The Court said:—

"There is undoubtedly a class of claims which, having "a moral but no legal efficacy, can be the subject of ratifi- "cation; but it is to be remembered that the effect of a "ratification is to impart validity to the original agree- "ment. Such an act creates no new obligation; it simply "extends the continuance of, or legalizes, one already in "existence. The maxim of the law is, '*Omnis ratihabitio "retrotrahitur et mandato priori æquiparatur.*' It follows "therefore, as a consequence which is entirely unavoid- "able, that there can be no such thing in law, strictly "speaking, as the ratification of a transaction which, at "the time of its performance, was prohibited by statute. "The parties cannot legalize that which the law has "declared illegal. It is competent to them to impart a "new efficacy to a voidable act, but they have no power to

" give life to an act which, from reasons of public policy, " has been ordained by the legislative authority to be " absolutely void."

Reeves v. *Butcher*, 31 N. J. Law, 224, 227.

After the validity of the statute (April 23, 1880) and its construction were declared by the courts of last resort of California in *McShane* v. *Carter*, the construction became, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself.

The United States Supreme Court discussed another prohibitive statute of a like character in the following language :—

" This interpretation of Sec. 7 of the Act of April 16, " 1869, accompanied all bonds subsequently issued into " the hands of whoever took them, whether a *bona fide* " holder or not. This Court must recognize this decision " of the Supreme Court of Illinois as an authoritative " construction of the statute made before the bonds " were issued and to be followed by this Court."—(Citing cases.)

German Bank v. *Franklin County*, 128 U. S., 526, 538.

We cite the following additional authorities illustrative of the principle that an Act, void *ab initio*, cannot be ratified.

In an action by an insurance company upon a note given by defendant for stock in the company and for premium subject to call by the directors of the company, it was held that there could be no recovery on the ground that the company was a foreign corporation, and had commenced business in violation of the statute which forbids all foreign insurance companies from doing business in the State until the requirements of the law applicable to such companies have been complied with. The Court said :—

"To permit the company, when they admit that they "have disregarded all these requirements, to recover, "would be for the courts to disregard the clearly expressed "will of the General Assembly, and to say what it has said "shall be unlawful is and shall be lawful and binding. "To enforce the payment of this note would be virtually "to repeal a plain enactment of the Legislature.

"When the Legislature prohibits an Act, or declares that "it shall be unlawful to perform it, every rule of inter- "pretation must say that the Legislature intended to inter- "pose its power to prevent the Act; and as one of the "means of its prevention, that the Court shall hold it void. "This is as manifest as if the statute had declared that it "should be void. To hold otherwise would be to give the "person or corporation or individual the same rights in "enforcing prohibited contracts as the good citizen who "respects and conforms to the law. To permit such con- "tracts to be enforced, if not offering a premium to violate "a law, certainly withdraws a large portion of the fear that "deters men from defying the law. To do so places the "person who violates the law on an equal footing with "those who strictly observe its requirements. That this "contract is absolutely void as to appellee we entertain no "doubt."

Cincinnati Mutual H. A. Co. v. *Rosenfeld*, 55 Ill. 85, 91.

"It is not material to inquire whether this bank of Brest "was organized or not. It is enough to know that it was "one of the large batch of banks established under a gen- "eral law of Michigan, which was recommended to the "popular sanction, and that numerous banks were organized "under it, all of which turned out to be banks without cap- "ital. They were all subject to what was called the Safety "Fund Act, which, by the thirty-first section provided that "no moneyed corporation subject to this Act shall issue "any bill or note of the said corporation unless the same "shall be made payable on demand and without interest. "The draft in question was in violation of that law, as it "was not made payable on demand. It was therefore an "instrument which the corporation had no right to create, "and being void it cannot be considered as payment to the "plaintiff."

Davis v. *The Bank of River Raisin*, 4 McLean 387.

"In *Wiggin* v. *Rush*, 12 Johnson 310, it was held that "notes void *ab initio* are equally so in the hands of a *bona* "*fide* holder; but the holder in this instance had notice. "The Safety Fund Act was a public law, and all who deal "in the paper of the bank are bound to take notice of its "provisions. If a corporation exceeds its powers, its acts "are void, and they are not made good by an alleged want "of notice of a defect of power."

Root v. *Wallace*, 4 McLean, p. 8.

See, also,

Root v. *Goddard*, 3 McLean 102.

In *Miller* v. *Stammon*, which was an action to enforce payment on a contract for the sale of wine—the wine having been delivered, but plaintiff not having a distiller's license as required by an ordinance of Chicago—the defendant set up in his answer that the contract was void. The Court upheld defendant in this contention, and said, speaking through Mr. Justice Brewer:—

"The general rule of law is, that a contract made in viola- "tion of a statute is void; and that when a plaintiff cannot "establish his cause of action without relying upon an "illegal contract he cannot recover. Pollock, Principles of "Contract, pp. 253, 260; *Penn* v. *Bornman*, 102 Ill. 523; "*Alexander* v. *O'Donnell*, 12 Kans. 608; *Gunter* v. *Leckey*, "30 Ala. 591; *Kennedy* v. *Cochran*, 65 Maine 594; *Bank of* "*the United States* v. *Owens*, 27 U. S. 2 Peters, 527, 539; "*Pangborn* v. *Westlake*, 36 Ia. 546, 549; *Harris* v. *Runnels*, "53 U. S. 12 How. 79, 84."

Miller v. *Stammon*, 145 U. S. 421, 426.

In a case in which a lease by one railroad company to another was held to be beyond the authority of one of the companies and therefore void, Mr. Justice Miller, in delivering the opinion of the Court, said:—

"It is argued in support of the decree that, though the "contract of lease may be void, so that no action could "originally have been sustained upon it, there has been "for ten years such performance of it, in the use, possession,

"and control of plaintiff's road and its franchises by the "defendants that they cannot now be permitted to repudi- "ate or abandon it. That it now presents one of a class of "cases which hold that where a void contract has been so "far executed that property has passed under it and rights "have been acquired under it, the courts will not disturb "the possession of such property or compel restitution of "money received under such a contract.

"Undoubtedly there are such decisions of courts of "high authority, and there is such a principle, very sound "in its application to appropriate cases. But we under- "stand the rule in such cases to stand upon the broad "ground that the contract itself is void, and that neither "what has been done under it, nor the action of the Court, "can infuse any vitality into it. Looking at the case as one "where the parties have so far acted under such a con- "tract that they cannot be restored to their original con- "dition, the Court inquires if relief can be given "independently of the contract, or whether it will refuse "to interfere as the matter stands. We know of no well "considered case where a corporation, which is a party "to a continuing contract which it had no power to make, "seeks to retract and refuses to proceed further, can be "compelled to do so. As was said in *Thomas* v. *Railroad* "*Company* (a case so often in point here), 'Having entered "'into the agreement it was the duty of the company to "'rescind or abandon it at the earliest moment. This duty "'was independent of the clause in the contract which gave "'them the right to do it. Though they delayed its per- "'formance for several years it was nevertheless a rightful "'act when it was done. Can this performance of a legal "'duty, a duty both to the stockholders of the com- "'pany and to the public, give to plaintiff a right of "'action? Can they found such a right on an agreement "'void for want of corporate authority and forbidden by "'the policy of the law? To hold that they can is, in our "'opinion, to hold that any act performed in execution of "'a void contract makes all its parts valid, and that the "'more that is done under a contract forbidden by law "'the stronger is the claim to its enforcement by the "'courts.'"

Penn. R. R. Co. v. *St. Louis etc. R. R. Co.*, 118 U. S. 290, 316.

In a case decided by the United States Supreme Court it was held that a lease given by a railway company of its entire property, was *ultra vires* and void. It was argued on behalf of the plaintiff that even if the contract sued on was void because *ultra vires* and against public policy, yet that "having been fully performed on the part of the "plaintiff and the benefits received by the defendant, for "the period covered by the declaration, the defendant was "estopped to set up the invalidity of the contract as a "defense to this action to recover the compensation agreed "on for that purpose."

The Court, in overruling this contention, after citing numerous cases in support of its views, said:—

"The view which this Court has taken of the question "presented by this branch of the case, and the only view "which appears to us consistent with legal principles, is "as follows:—

"A contract of a corporation which is *ultra vires*, in the "proper sense, that is to say, outside the object of its crea- "tion, as defined in the law of its organization, and "therefore beyond the powers conferred upon it by the "legislature, is not voidable only, but wholly void, and of "no legal effect. The objection to the contract is, not "merely that the corporation ought not to have made it, "but that it could not make it. The contract cannot be "ratified by either party, because it could not have been "authorized by either. No performance on either side "can give the unlawful contract any validity, or be the "foundation of any right of action upon it.

"When a corporation is acting within the general scope "of the powers conferred upon it by the Legislature, the "corporation, as well as persons contracting with it, may "be estopped to deny that it has complied with the legal "formalities which are prerequisites to its existence or to "its action, because such requisites might in fact have "been complied with. But when the contract is beyond "the powers conferred upon it by existing laws, neither "the corporation, nor the other party to the contract, can "be estopped by assenting to it, or by acting upon it, to "show that it was prohibited by those laws."

. . . . . .

" The ground, and the limits of the rule concerning the " remedy, in the case of a contract *ultra vires*, which has " been partly performed, and under which property has " passed, can hardly be summed up better than they " were by Mr. Justice Miller, in a passage already quoted, " where he said that the rule 'stands upon the broad " 'ground that the contract itself is void, and that noth- " 'ing which has been done under it, nor the action of the " 'court, can infuse any vitality into it.' "

Central Trans. Co. v. *Pullman's Car Co.*, 139 U. S. 24, 59.

See also *Leavitt* v. *Palmer*, 3 N. Y. 19.

Mercantile paper made void *ab initio* by a statute is void in the hands of a *bona fide* holder.

Vallett v. *Parker*, 6 Wendell, 615;

City of Aurora v. *West*, 22 Ind. 28;

Bailey v. *Tabur*, 5 Mass. 286;

Glenn v. *Farmers Bank*, 70 N. C. 191.

When a statute forbids banking companies to issue notes on time or on interest, notes issued on time or on interest by such companies are absolutely void.

Swift v. *Beers*, 3 Denio, 70;

Tyler v. *Yates*, 3 Barb. 222.

A loan made by the director of a bank to the bank itself, in violation of a statutory provision, is absolutely void and cannot be enforced.

Penn v. *Bornman*, 102 Ill. 523;

See also Pomeroy on Contracts, 2d Ed., sec. 286;

McCormick v. *National Bank*, 165 U. S. 538;

The California Bank v. *Kennedy*, 167 U. S. 362, 371.

Petitioner's contention that the indenture was, in fact, actually ratified, is refuted by an examination of the record, and the record further shows the indenture void, because it was not authorized by the directors of the corporation.

Petitioner in his brief refers to pages 153 and 154 of the record, claiming that the same show compliance with the provisions of the Act of 1880, page 131. A reference to those pages of the record shows the minutes of a certain meeting held on June 25, 1890, and it clearly appears that this meeting was only an informal meeting of the corporators of the newly created corporation, *held without any notice*, for the purpose of organizing the new corporation.

The contention of appellant that this was a meeting of stockholders clearly appears to be a far-fetched afterthought; but even if this claim were tenable no valid ratification of the indenture at bar is shown, because the ratification, to be valid, was required to be as prescribed by the statute; and the statute provides that the ratification must be made by a resolution duly passed at a stockholders' meeting *called for that purpose*. It seems clear that the Legislature passed the Act of 1880 with a definite purpose, and stated distinctly a number of requirements mandatorily imposed to make valid a conveyance of mining ground by a mining corporation. The Court of last resort of California, having sustained the validity of this Act and construed it as hereinbefore stated, compliance with all the requirements of the statute was necessary to be shown. It seems clear, also, from the language employed in that statute that the Legislature must be held to have intended to prescribe distinctly that the ratification was to be made at a formal meeting of stockholders, and not at an informal meeting of corporators who might or might not be stockholders within the true meaning of the term. The Legislature certainly had the power to prescribe such requirements; and if they were advisedly prescribed, as is held by the Court of last resort of this State, then those requirements must be held to be indispensably necessary.

We think the contention of petitioner on this head is foreclosed by the apt language quoted from *McShane* v. *Carter*. The California statute, as construed by the California Court of last resort, demands that the ratification must be made by the stockholders *as prescribed by the act*. Such ratification must be either—

(a) In writing signed and acknowledged by such stockholders, or

(b) By resolution duly passed at a stockholders' meeting called for that purpose.

Stats. of Cal. 1880, p. 131.

These formalities required by law are indispensable and must not be omitted.

Daniel Rhea v. *Daniel Rhenner*, 26 U. S. (1 Peters) 105.

Pages 153 and 154 of the record referred to do not show due compliance with the Act, and we contend that the court below, therefore, properly found that there was no ratification of the indenture under consideration.

Again referring to pages 153 and 154 of the record, we find the minutes of a certain meeting of the corporators of the newly created corporation, The Gold Hill Mining Company, which show the business transacted at the meeting. The corporators met; *first* waived notice of the meeting, *next* received proof of the final incorporation of the company, *then* passed a resolution:—

"On motion of W. W. Tucker, seconded by R. H. Petti-
"grew, Jr.," to the effect:
"That the said Gold Hill Mining Company issue one
"hundred *first mortgage bonds* of the denomination of *five*
"*hundred dollars* each, each bond bearing date July 1st,
"1890, etc.," *thereupon* elected G. L. Morse trustee for
"the bondholders, and appointed him to draw up a

" proper bond, and *finally after* all this had been done,
" 'On motion of Mr. J. Shoecraft, seconded by G. L.
" 'Morse, it was voted that the incorporators of the Gold
" 'Hill Mining Company be named as directors of said
" 'company.' "

Now whatever else may be claimed as the effect of this meeting and of these proceedings, it surely must be conceded that the resolution referred to relating to the prospective mortgage, was not adopted or passed by the directors of the corporation, The Gold Hill Mining Company, for there were no directors of the corporation named or in existence at the time when that resolution was passed.

The record in this case further shows that at no time was any resolution adopted by the Board of Directors of the corporation, The Gold Hill Mining Company, corresponding to the resolution of the corporators above referred to; the Board of Directors never did provide for or sanction such a mortgage as was specified in the corporators' resolution. The indenture which is the basis of this action never was authorized by any resolution or action of the Board of Directors of the Gold Hill Mining Company. Under the defenses pleaded in this action (Record, pp. 38, 39, 49), plaintiff was required to show such authorization, and having failed to do so must be defeated. The law upon this phase of the case seems clear. In a similar case it was said:—

"The only authority upon which the President and
" Secretary acted was the resolution passed at the pre-
" liminary meeting of stockholders, before organization
" of the Board of Directors, and that authorization was
" insufficient to support a finding of due and regular
" execution is a proposition scarcely requiring authority
" in its support; *Gashwiler* v. *Willis*, 33 Cal. 12; 91 Am.

" Dec. 607; *Alta Silver Mining Co.* v. *Alta Placer Min. Co.*, " 78 Cal. 629."

Blood v. *La Serena etc.*, 113 Cal. 221, 226.

"The President has not the power, by virtue of his " office, to mortgage the property of the company (see " generally *Bliss* v. *Kaweah C. & I. Co.*, 65 Cal. 502), nor " has the Secretary such power by virtue of his office " (*Blood* v. *Maceuse*, 38 Cal. 594; 99 Am. Dec. 435); " nor have both together the power which neither has " separately, nor have the stockholders such power (*Gash-* " *wiler* v. *Willis*, 33 Cal. 12; 91 Am. Dec. 607). The " powers of a corporation must be exercised, and its " power controlled by its Board of Directors (Civ. Code, " Sec. 305); the decision of a majority of the directors, " 'made when duly assembled,' being valid as a corpo- " rate act (Civ. Code, Sec. 308). The Board must be " duly assembled (*Harding* v. *Vandewater*, 40 Cal. 78). " And their transaction should be recorded (Civ. Code, " Sec. 397; *Southern Cal. Assn.* v. *Bustamente*, 52 Cal. " 192). The directors when not acting as a board, have " not the necessary power (*Gashwiler* v. *Willis*, 33 Cal. 18; " 91 Am. Dec. 607). The absence of a resolution of the " board renders the instrument invalid (*Southern Cal. Assn.* " v. *Bustamente*, 52 Cal. 192)."

Alta Silver Mining Co. v. *Alta Placer Mining Co.*, 629, 632.

See, also,

Smith v. *Dorn*, 96 Cal. 82, 83;
Salfield v. *Sutter L. I. & R. Co.*, 94 Cal. 548, 549.

In the case of *Blood* v. *La Serena etc.*, *supra*, the Court held that evidence might be adduced to show that the corporation was prevented by matters establishing an *estoppel in pais* from attacking the validity of the mortgage there involved. But the mortgage there involved was one made on the part of an ordinary commercial corporation covering agricultural lands only.

III.

Counsel for petitioner in his petition asserts that "the matters involved in this case relate not to mere "questions of local law or importance, but to a question "of general and commercial law affecting vast interests of "foreign corporations in various States of the Union and "the safeguards surrounding owners of their negotiable "bonds authorized by the laws of the State creating the "corporation, as against subsequent creditors whether by "judgment or otherwise, renders this case eminently one "in which a writ of *certiorari* should be granted."

We respectfully submit that this begs the whole question. That the case presented is not one of general or commercial law, has been fully demonstrated. That the matters involved affect "vast interests" of foreign corporations in various States of the Union, is a gratuitous statement not warranted by anything before this Court.

We venture the assertion that foreign corporations which conduct business in the loose and slipshod manner shown by this record are not very numerous.

If they are, and investors have been careless and negligent enough to purchase their wares without investigating the state of the title to the lands deeded as security for the bonds issued, they must pay the penalty and suffer such loss as flows from a failure to observe the laws of the State where such corporations acquire and attempt to transfer and encumber real property.

The fact that the amount of the bond issue is $50,000, and that interest has accumulated thereon, is not a factor in this case. The bondholders have their remedy against the Gold Hill Mining Company. The validity of the indebtedness is not questioned.

We respectfully submit that there is no merit in the petition and that it should be denied.

CURTIS H. LINDLEY,
HENRY EICKHOFF,
Solicitors for Respondents.